No. 990

In the Supreme Court of the United States

October Term, 1940

The United States, petitioner
v.
Nunnally Investment Company

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases:

444352—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER

v.

NUNNALLY INVESTMENT COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 20–32) is reported in 36 F. Supp. 332.

JURISDICTION

The judgment of the Court of Claims was entered January 27, 1941 (R. 32). The petition for a writ of certiorari was filed April 25, 1941 (R. 32), and was denied on May 26, 1941. Upon petition for rehearing, the order denying certiorari was vacated and the petition granted on December 22, 1941. The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue, awarding it a refund of income taxes for the year 1920. May it thereafter bring another suit in the Court of Claims to obtain an additional refund of income taxes for the same year which it had paid to the same Collector?

STATUTES INVOLVED

Revised Statutes.

> SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.
>
> (U. S. C., Title 28, Sec. 842.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 1128.
>
> * * * * *
>
> (b) Section 3210 of the Revised Statutes, as amended, is reenacted without change, as follows:

"Sec. 3210. (a) Except as provided in subdivision (b) the gross amount of all taxes and revenues received under the provisions of this Act, and collections of whatever nature received or collected by authority of any internal-revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury as internal-revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, ~~costs, charges~~, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the treasurer, assistant treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue.

*   *   *   *   *

(U. S. C., Title ~~26, Sec.~~ 3971.)

STATEMENT

The special findings of fact of the Court of Claims (R. 13–19) may be summarized as follows:

The respondent is a Delaware corporation, the successor, since 1935, of a Georgia corporation of the same name. The Georgia corporation, formerly the Nunnally Company, is hereinafter referred to as the taxpayer (R. 13–14).

On January 2, 1920, the taxpayer sold all its business and assets to the Nunnally Company of Dela-

ware for $3,000,000 cash and the assumption of certain of the taxpayer's liabilities, including Federal taxes for the years 1917, 1918, and 1919. These taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in the year 1920, and the remainder of $39,739.50 was paid in 1921 and 1922 (R. 14).

Taxpayer filed an income tax return for the year 1920, reporting a net profit of $379,384.22 from the sale of its assets, but showing no tax liability as a result of certain offsetting items (R. 14–15). Thereafter the Commissioner of Internal Revenue determined a deficiency for the year 1920 in the amount of $493,817.95. In determining the deficiency the Commissioner employed a lower basis in computing gain upon sale of the taxpayer's assets, and he used $3,209,958.91 as the sales price, representing the cash consideration of $3,000,000 plus $209,985.91 of the taxpayer's tax liability for earlier years which the vendee discharged. The profit on sale was thus computed to be $1,637.467.80 (R. 8–11, 15).

The additional tax assessed, together with interest of $16,113.34 making a total amount of $509,931.29, was demanded of the taxpayer by the Collector of Internal Revenue for the District of Georgia, and was paid to the Collector on September 21, 1926 (R. 15).

On April 22, 1927, the taxpayer filed with the Collector a claim for refund for the full amount

of taxes and interest paid alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold. No other ground for refund was stated in the claim. More than six months after the filing of the claim, the taxpayer filed suit against the Collector in the United States District Court for the Northern District of Georgia, denying that any of the taxes assessed against it were due and raising no issue except the basis for determining profit of the assets sold on January 2, 1920 (R. 15).

The case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold. The jury rendered a special verdict determining the value as of March 1, 1913, of the entire business and property of the Nunnally Company and of certain leases. Thereafter the Collector filed a motion for a new trial (R. 15–16).

Upon order of the court, the parties submitted computations of the amount of the judgment to be based on the verdict, the taxpayer submitting two computations and the Collector one. In all of these computations the sales price used was the same, i. e., $3,209,958.91, but there was a divergence in other figures making a considerable difference in the computations of the amount of the overpayment of tax and interest (R. 16–17).

In the light of the dispute between the parties as to the proper use of the figures and of the de-

fendant's [the Collector's] motion for a new trial, the parties on June 27, 1929, entered into the following stipulation for judgment and no appeal (R. 17–18):

> Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.
>
> Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.
>
> It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into.

On the basis of this stipulation for judgment, judgment was entered on July 6, 1929, for $250,000

and interest and costs of suit, and a certificate of probable cause was granted. Thereafter a certificate of overassessment was issued to the taxpayer and the total amount of $295,265.33 shown thereon was paid to it on or about September 29, 1929 (R. 18).

Thereafter, on September 13, 1930, the taxpayer filed a claim for refund of $200,000 income and profits taxes for 1920. It sought refund on the ground, *inter alia*, that the sales price of the assets should not have been as high as $3,209,958.91, because some of the taxpayer's pre-1920 taxes which the vendee paid and which were included in that purchase price, were in fact not paid until 1921 and 1922 and therefore could be income to the taxpayer only in the latter years rather than in 1920. The claim also sought refund on other grounds that were later abandoned [1] (R. 18–19).

Upon rejection of this claim, suit was instituted in the Court of Claims on March 18, 1933.

The Court of Claims gave judgment for the taxpayer holding that the taxes assumed by the purchaser, but not paid until after 1920, did not constitute taxable income to the respondent in 1920; and that the judgment against the Collector in the District Court was not *res judicata* in this suit against the United States (R. 20). Judge Whitaker dissented (R. 26).

---

[1] These other grounds accounted for most of the $200,000 claimed. The ground remaining in the case involved only $18,280.17 in taxes, plus interest (R. 32).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in permitting a suit against the United States to recover taxes for the year 1920, notwithstanding the prior judgment in the suit against the Collector of Internal Revenue with respect to the same tax for the same year.

SUMMARY OF ARGUMENT

The earlier suit against the collector precludes the maintenance of this suit. The taxes involved relate to the year 1920 and were paid in a lump sum to a single collector. Whatever rights the taxpayer may have had to a refund of those taxes constituted but a single cause of action, and it could have raised every issue with respect to the validity of those taxes in the earlier suit.

Congress has established elaborate machinery for administrative and judicial review of Federal income tax controversies. The aggrieved taxpayer is given an alternative of three courses of action: (a) he may contest the taxes in the Board of Tax Appeals; (b) he may pay the taxes and sue the United States for refund; or (c) he may pay the taxes and sue the collector for refund. But whichever course he elects, he is simply litigating a single cause of action and should not be permitted to relitigate the liability for the same year's taxes in another forum.

Although the collector suit is historically derived from a common law proceeding in assumpsit, and although it retains some of the "personal" char-

acteristics of its common law precursor, it is nevertheless a *statutory* remedy today. And since it is one of three statutory remedies, it is no answer to say that its "personal" attributes render it a cumulative rather than an alternative remedy. The rule against splitting a single cause of action is well established, and it should not be assumed, in the absence of clear legislative language, that Congress intended a departure from that rule here.

Our position is not contrary to the recent decision in *United States* v. *Kales* (No. 35, this Term, decided December 8, 1941) which involved taxes paid to two different collectors and therefore two causes of action rather than one. It is also not inconsistent with *Sage* v. *United States*, 250 U. S. 33, for reasons set forth at length in the Argument.

ARGUMENT

THE MAINTENANCE OF THIS SUIT IS FORECLOSED BY THE PRIOR SUIT FOR THE SAME TAX YEAR IN WHICH THE TAXPAYER COULD HAVE SOUGHT REFUND FOR THE AMOUNT INVOLVED HEREIN

Introductory.—This case involves taxes for the year 1920. The returns originally filed on March 15, 1921, disclosed no tax liability. Thereafter, in 1926, the Commissioner determined a deficiency of $493,817.95 which was assessed and paid together with interest to the Collector of Internal Revenue. The deficiency was based upon a recomputation of the taxpayer's profit from the disposition of its business, which it had sold in 1920 for $3,000,000 in

cash plus the purchaser's assumption of certain of the taxpayer's outstanding liabilities, including federal taxes for the years 1917, 1918, and 1919. Those early taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in 1920, and the remaining $39,739.50 in 1921 and 1922. Thus, the total consideration received upon the sale of the taxpayer's business was $3,209,958.91.

In determining the taxpayer's deficiency for 1920, the Commissioner made a downward revision of the basis of the assets sold and used $3,209,958.91 as the sales price.

After paying the deficiency, the taxpayer filed a claim for refund, in which it alleged as its sole ground that the Commissioner had understated the basis of the assets. It then brought suit against the collector for refund of *the full amount* of the deficiency. The jury did not render any general verdict but it made certain findings of fact in the form of a special verdict. There then arose a dispute between the parties as to the computation of the refund allowable based upon the jury's findings, and that dispute was settled by a compromise in which the taxpayer agreed to accept a refund of $250,000 plus interest. It was further stipulated that neither side would appeal.

On the basis of that agreement, judgment was entered on July 6, 1929, which was satisfied on September 29, 1929 by the payment of $250,000, plus $45,246.58 interest, plus $18.75 costs (R. 18).

On September 13, 1930, the taxpayer filed another claim for refund upon a variety of grounds in which it sought an additional refund for the same year. It has since abandoned all except one of those grounds (R. 18), namely, that the purchaser's payment of the vendor's 1917–1919 taxes could not be included in the sales price for 1920 to the extent that the purchaser paid those early taxes in 1921 and 1922, i. e., to the extent of $39,739.50, and that the profit on sale must be reduced accordingly.[2]

Thus, although the taxpayer has already prevailed in a suit against the collector on the ground that its profit on sale was erroneously computed, it now seeks an additional refund in a suit against the United States based upon a recomputation of the profit on the identical sale. Plainly, the taxpayer could have presented the entire controversy in the prior case, and could have asked for a redetermination of the sales price as well as the basis of the assets;[3] and, indeed, it did ask for a refund of the *full amount* of the taxes it had paid (R. 15).

[2] The taxpayer has not disputed that the $39,739.50 was taxable income. Its sole contention has been that it could not be taxed in 1920. Presumably, it would be taxable in 1921 and 1922 unless liability were barred by the statute of limitations.

[3] Of course, it probably would have had to amend its claim for refund so as to raise the issue squarely in that case, but the statute of limitations had not run when it commenced the prior suit, and it was entirely free to amend its claim at that time.

It is our position that normally the tax liability for any year constitutes but a single cause of action, and that a taxpayer may not litigate that liability in more than one suit. At the very outset, before setting forth our position in full, it is important to distinguish *United States* v. *Kales*, No. 35, this Term, decided December 8, 1941. The *Kales* case involved the unusual situation in which taxes had been paid to *two* different collectors. The taxpayer thus had two separate causes of action, one against each collector; and in her suit against one of the collectors she had recovered all the taxes that she had paid to him. In that suit she could not have recovered any of the taxes that she paid to the other collector. She then brought a second suit in which she sought refund of the remaining taxes. Thus, this Court treated the case as though there were two separate causes of action, and held that recovery on one cause of action did not preclude suit upon the second. Here, on the other hand, all the taxes involved were paid to a single collector, and every question with respect to their validity could have been raised in the taxpayer's prior suit. We contend that Congress in providing for three different methods of contesting taxes (i. e., suits against the United States, suits against the collector, and proceedings before the Board of Tax Appeals) intended those methods to be alternative, and did not contemplate that a taxpayer who was unsuccessful or only partly successful in

one forum should then be able to relitigate the same cause of action on the same or different theories in a different forum.

1. The principle that a single cause of action may not be split is of long standing. In *Stark* v. *Starr*, 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. * * *

See also *Grubb* v. *Public Utilities Comm.*, 281 U. S. 470; *United States* v. *California and Ore. Land Co.*, 192 U. S. 355; *Werlein* v. *New Orleans*, 177 U. S. 390; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Nolan* v. *City of Owensboro*, 75 F. (2d) 375 (C. C. A. 6th); *Fields* v. *Philadelphia Rapid Transit Co.*, 273 Pa. 282; *See* v. *See*, 294 Mo. 495. In accord with that principle it has been often held that a judgment in a former suit for refund is a bar to a subsequent suit for refund of taxes for the same year notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Chicago Junction Rys. etc.* v. *United States*, 10 F. Supp. 156 (C. Cls.); *Bowe-Burke Mining Co.* v. *Willcuts*, 45 F. (2d) 394 (Minn.); *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.). See also *Bertelsen* v. *White*, 58 F. (2d) 792 (Mass.), affirmed on other

grounds, 65 F. (2d) 719 (C. C. A. 1st), and *American Woolen Co.* v. *United States,* 18 F. Supp. 783 (C. Cls.), affirmed on rehearings, 21 F. Supp. 125, 1021, certiorari denied, 304 U. S. 581.

Thus in *Guettel* v. *United States,* 95 F. (2d) 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603, an estate tax case, the court said that taxpayers (p. 231):

> were not at liberty to split up their claim for the recovery of their overpayment of the estate tax, and to prosecute it piecemeal or to present in their first suit only a portion of the grounds upon which they based their claim that the tax had been overpaid, and leave another ground or other grounds to be presented in a subsequent action.

Similarly, in *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554 (Md.), the court went even further, holding that a former suit against the collector for refund of taxes barred a second suit against the United States for interest. The court said (p. 556):

> a tax and resulting interest are to be treated as constituting a single liability and thus as one cause of action, and not merely an aggregation of separate items of indebtedness. * * *
>
> * * * * * * *
>
> It is fundamental that a single cause of action may not be split up and brought piecemeal, because, otherwise, litigation might be rendered interminable. See *Stark* v. *Starr,*

> 94 U. S. 477, 24 L. Ed. 276; *Baltimore Steamship Company* v. *Phillips,* 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Freeman on Judgments, 5th Ed. § 596. This doctrine is equally applicable to tax cases. *Guettel* v. *United States,* 8 Cir., 95 F. (2d) 229; *International Curtis Marine Turbine Co.* v. *United States,* Ct. Cl., 56 F. (2d) 708. * * *

And it has been held in other circumstances that the claim that the income tax for a single year has been overpaid constitutes but one cause of action. *International Curtis Marine Turbine Co.* v. *United States,* 56 F. (2d) 708 (C. Cls.); *American Woolen Co.* v. *United States,* 18 F. Supp. 783 (C. Cls.), *supra.*

The foregoing principles are fully applicable to collector suits. To require the taxpayer to litigate its liability in a single suit works no hardship. The taxpayer had a right to a jury trial and could have raised every possible issue relating to its liability for the year in question. And in a suit for refund even against a collector, there is drawn into question every item which entered into the computation of the tax. *Lewis* v. *Reynolds,* 284 U. S. 281. The taxpayer should not be permitted to split a single cause of action and litigate the parts in separate proceedings.

2. Moreover, the statutory scheme for administrative and judicial review of tax controversies makes it highly unlikely that Congress intended to

permit a multiplicity of suits on the same cause of action. The dissatisfied taxpayer may take any one of three courses of action: (a) he may seek review of the Commissioner's determination in the Board of Tax Appeals and thereafter in the appellate courts; (b) he may pay the contested tax and sue the United States for refund either in the Court of Claims or in the District Court (subject to certain jurisdictional restriction in the latter); or (c) he may sue the Collector for refund in the District Court. If the taxpayer goes to the Board of Tax Appeals, he is thereafter precluded by Section 284 (d) of the Revenue Act of 1926 from bringing suit for the recovery of any part of such tax in any court with certain exceptions. This statute is merely in recognition of the rule generally followed that a single cause of action may not be the subject of more than one suit. If the taxpayer elects course of action (b) or (c) instead of seeking relief in the Board of Tax Appeals, he should not thereafter be allowed to elect another course. Having once made his election, he should be bound thereby.

If respondent's position were correct, then the Government would have the right, conversely, to sue a taxpayer in the name of the United States notwithstanding that a prior suit between the collector and the taxpayer had already settled the taxpayer's liability for the year in question. The Government has never assumed that it had any such

right, and it would indeed be a surprise to a taxpayer to learn that he might be harassed by the United States in a subsequent suit for the very taxes that had been adjudicated in a suit between himself and an officer of the Treasury Department who was represented in the litigation by the Attorney General.

3. That the collector suit, even though described as "personal," is now a statutory remedy cannot be open to serious question. At one time it was purely a common law proceeding in assumpsit. *Elliott* v. *Swartwout,* 10 Pet. *137. But when a statutory duty was imposed upon the collector to pay his collections into the Treasury, it was held that the common law action disappeared (cf. *Cary* v. *Curtis,* 3 How. 236), and the various statutory provisions which restored the right to sue the collector make it unmistakably plain that although Congress intended the collector suit to retain certain "personal" attributes (e. g., jury trials), it is nevertheless a *statutory* remedy.[4] *Schoenfeld* v. *Hendricks,* 152 U. S. 691, 693; *Nichols* v. *United States,* 7 Wall. 122, 126–127; *Barney, Collector* v. *Watson,* 92 U. S. 449, 452; *Arnson* v. *Murphy,* 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden,* 137 U. S. 310, 329; *City of Philadelphia* v. *The Collector,* 5 Wall. 720, 731–735; *Collector* v. *Hubbard,* 12 Wall.

---

[4] The history of the collector suit is traced in greater detail in our brief in *United States* v. *Kales,* No. 35, this Term, pp. 34–38.

1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The present status of the suit against the collector was thus summarized by Mr. Justice Cardozo in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. *He is made a defendant because the statute has said for many years that such a remedy shall exist,* though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics supplied.]

True, in some circumstances the suit against the collector may retain certain of its "personal" characteristics,[5] as Congress has intended that it

[5] See, e. g., *Patton* v. *Brady*, 184 U. S. 608, 612–615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Lowe Bros Co.* v. *United States*, 304 U. S. 302.

should, but the plain fact remains that it is in reality a suit against the Government, that the Attorney General appears on behalf of the collector (against whom execution will not issue) with full authority, in the language of *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 403, "to represent its [the Government's] interests in a final adjudication of the issue in controversy." The mere fact that Congress intended the collector suit to retain certain procedural incidents, such as jury trials, does not mean that it intended the "personal" character of the remedy to be the basis for multiple litigation on the same cause of action. The collector suit is a statutory remedy, and such a departure from normal legal principles should not lightly be inferred in the absence of clear statutory language to that effect.

4. Our position is not opposed to *Sage* v. *United States,* 250 U. S. 33, which arose under materially different statutory provisions. The death taxes there involved had been collected under an 1898 statute, and a 1902 statute had thereafter directed refund of certain taxes theretofore collected. The claimant brought suit and recovered judgment against the collector in the amount then thought to be refundable. However, it appeared that judgment should have been in a greater amount, and Congress in 1912 enacted further legislation spelling out the extent of refund in such circumstances. The claimant thereafter brought suit against the

United States for the difference, relying primarily upon the newly enacted 1912 legislation. As the Court in the *Sage* case noted, 250 U. S. at 39, "The Act of 1912, like that of 1902, created rights where they had not existed before * * *." Accordingly, although the opinion dealt at length with the "personal" nature of the collector suit, the decision is supportable upon the ground that the rights which were the subject matter of the second suit had not been the subject of prior litigation. Indeed, the *Sage* case has been regarded at least several times as resting upon the particular legislation there involved. See *Second Nat. Bank of Saginaw* v. *Woodworth,* 54 F. (2d) 672, 673 (E. D. Mich.), affirmed, 66 F. (2d) 170 (C. C. A. 6th); *Cudahy Packing Co.* v. *Harrison,* 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7th). See also Griswold, *Res Judicata in Federal Tax Cases,* 46 Yale L. J. 1320. 1341-1342.

Moreover, the *Sage* case can have no bearing upon our argument that Congress did not intend to permit multiple suits on the same cause of action in view of the comprehensive machinery that it has established for litigating tax matters. That issue was never raised in the *Sage* case (cf. *Webster* v. *Fall,* 266 U. S. 507, 511), and indeed could not have been fully presented at that time, for the Board of Tax Appeals had not yet come into existence.

The *Sage* case is further distinguishable upon the ground that whatever vital distinctions may then have existed between suits against the collector and suits against the United States have disappeared since that time. Thus, the Court stated (250 U. S. at 37), "The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." At that time interest was allowable on judgments against the collector (cf. *Erskine* v. *Van Arsdale*, 15 Wall. 75), whereas Congress had made no provision for interest in suits against the United States. That difference obviously made it much more attractive to sue the collector than the United States, and probably is in large part responsible for the much larger proportion of suits against collectors at that time. But that discrepancy has since been eliminated by Section 177 of the Judicial Code, as amended by Section 1324 (b) of the Revenue Act of 1921 (42 Stat. 227), Section 1117 of the Revenue Act of 1926 (44 Stat. 9), Section 615 of the Revenue Act of 1928 (45 Stat. 791), and as finally amended by Section 808 of the Revenue Act of 1936 (49 Stat. 1648), so that the provisions for interest are identical irrespective of whether the defendant is the collector or the United States. As to what the Court in the *Sage* case meant by the difference in the "nature of the defenses open" it is difficult to determine. Although there may be certain procedural differences between the two

types of suits, there are, we believe, no differences of any substance.

At the time of the *Sage* decision (1919), it was essential to allege that the taxpayer had paid under protest, in order to support the action in assumpsit. But that requirement was subsequently eliminated by the Revenue Act of 1924, *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, and since that time the taxpayer's "cause of action" against the collector is in all essential respects a right against the United States. Accordingly, although it is true that Congress intended to retain the collector suit as one of the methods of litigating federal taxes, it nevertheless swept away the last remaining basis for the fiction that the "cause of action" against the collector is "personal." True, certain "personal" characteristics of a procedural nature remained, but the suit against the collector became in substance a suit against the Government. As the Court in the *Moore Ice Cream Co.* case observed (p. 379), the 1924 amendment "* * * did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule." In these circumstances, the *Sage* case is plainly no bar to the application of the usual principles of *res judicata* here. Cf. *Chicago, R. I., & P. Ry.* v. *Schendel,* 270 U. S. 611, 620; *Calhoun's Lessee* v.

Dunning, 4 Dall. 120, 121; *Cromwell* v. *County of Sac*, 94 U. S. 351, 360; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284, 285; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404; *Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475. See *United States* v. *Candelaria*, 271 U. S. 432, 444.

5. Finally, for the further reasons set forth at length in Judge Whitaker's dissenting opinion (R. 26–32), the maintenance of this suit is forbidden by the doctrine of *res judicata*, and this result is not contrary to any decision of this Court. The contrary view of the majority is that the suit against the collector was "personal" and hence cannot bind the United States.[6]

The fallacy in applying that reasoning here is this. Section 989 of the Revised Statutes, *supra*, p. 2, provides that where recovery is had against a collector and the court certifies [1] "that there was probable cause for the act done by the collector * * * *or* [2] that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government," then no execution may issue against the collector and the judgment must be paid by the United States. The pivotal factor here is the fact that the two conditions quoted above are in the disjunctive. The

[6] Compare the language of this Court in the *Kales* opinion to the effect that "The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it." Advance sheets, p. 9.

collector is relieved of liability *either* where there is probable cause *or* where he has acted under the direction of a superior officer. Where the collector must rely only upon probable cause, then the suit against him may conceivably be regarded as "personal," and only upon the issuance of a certificate of probable cause does the United States become liable to pay the judgment. But where, as here, the taxes were collected in 1926 in pursuance of an assessment of the Commissioner of Internal Revenue, the collector does not have to rely upon "probable cause." He is protected *from the very outset* against execution on any judgment that may be rendered in the proceedings. The moment such a suit is brought against the collector, it is the United States and only the United States that ever can be liable on any judgment entered in favor of the taxpayer. And in such a suit the United States appears through its Attorney General, not to defend itself against any possible secondary liability, but rather against its own liability. In no circumstances could a "personal" judgment in any real sense be rendered against the collector where he has collected the tax pursuant to instructions from his superior officer.

As Judge Whitaker points out (R. 27–28), it was assumed in the *Sage* case that a certificate might or might not have been granted to the collector, and since the United States could not know whether a certificate would issue, it was a stranger to the

judgment at the time it was rendered. The Court said (250 U. S. at 37):

> At the time the judgment is entered the United States is a stranger. Subsequently the *discretionary* action of officials may, *or it may not*, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. [Italics supplied.]

Here, on the other hand, liability of the United States rests, not on a certificate of "probable cause," but rather on the fact that the collector acted under the directions of his superior. There never was a moment in which the liability of the United States was in doubt with respect to any judgment that might nominally be entered against the collector.[7]

We wish to make it plain that we are not asking the Court to make any departure from established

[7] These considerations similarly appear not to have been examined in *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Moreover, that case did not involve the question whether the very liability litigated could thereafter be relitigated in another suit. It involved an extension of the doctrine of *res judicata*, namely, the effect of a decision of tax liability for one year upon a similar but nevertheless entirely separate liability for a later year. This is an entirely different question; a judgment with respect to an earlier tax year may not be binding as to a later year, although the liability for the early year itself could undoubtedly not be relitigated. Cf. *Blair* v. *Commissioner*, 300 U. S. 5.

principles. We recognize that the collector suit is "deeply imbedded in the statutes and judicial decisions of the United States." *United States* v. *Kales*, advance sheets, p. 9. But we do say that notwithstanding certain procedural characteristics, such as jury trials, that are attributable to its historical origin, the collector suit is nevertheless a statutory remedy today; and that since Congress has established a comprehensive system for litigating federal taxes, it is not to be presumed, in the absence of clear statutory language, that Congress intended to permit a single cause of action to be litigated in more than one suit. Although the collector suit is concededly a permissible mode of contesting federal taxes, it is nevertheless in fact a suit against the Government in the circumstances of this case, and a judgment in such a suit should not be subject to reconsideration in another suit against the United States.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

Charles Fahy,
Solicitor General,
Samuel O. Clark, Jr.,
Assistant Attorney General,
Arnold Raum,
J. Louis Monarch,
Elizabeth B. Davis,
Special Assistants to the Attorney General.

February 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942